Bitart Hardware Sdn Bhd v CH Steel Sdn Bhd (formerly known as CH Steel Bhd) & Anor and other parties

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING UP NO D8–28–816 OF 2003
ABDUL WAHAB SAID AHMAD J
9 FEBRUARY 2006

Land Law — Restraint on dealings — Private caveat — Whether caveatable interest — Shareholders of wound-up company caveated land on the ground that liquidator sold land to third party at undervalued price — Whether fraud proved

CH Steel Sdn Bhd was wound up on 22 October 2003. Prior to the winding up, CH Steel Sdn Bhd was the registered owner of several pieces of land ('the land'). As security for its loan, CH Steel Sdn Bhd had deposited the documents of title to the lands with the HSBC Bank (M) Bhd ('the bank'). After CH Steel Sdn Bhd defaulted in payment of the loan, the bank appointed receivers and managers of the assets charged to the bank and also commenced legal proceedings against CH Steel and the guarantors in the Penang High Court. A consent judgment was entered against CH Steel Sdn Bhd and the guarantors. Pursuant to the judgment steps were taken by the receivers and managers to dispose off the land. They were not successful. After CH Steel Sdn Bhd was wound up on 22 October 2003 at the instance of a creditor Bitart Hardware Sdn Bhd ('the applicant'), the bank approached the liquidator to sell the land. The liquidator with the consent of the bank fixed the redemption sum at RM9.5m and sold the land to Tatt Giap Steel Centre Sdn Bhd vide a sale and purchase agreement dated 31 December 2004.

The respondents, being shareholders of CH Steel Bhd, lodged a caveat on the lands. Hence the applicant, CH Steel Sdn Bhd's liquidator and the bank filed this application to remove the private caveat on the ground that the respondents had no caveatable or beneficial interest in the assets of CH Steel Sdn Bhd. The respondents' main complaint was that the liquidator was taking instructions from the bank, an unsecured creditor and was selling the land below market value and at a price RM1m lower than what a purchaser nominated by them had offered.

Held, allowing the application:

(1) The respondents could not maintain that they were entitled to lodge a caveat on the lands merely because they were shareholders, contributors or guarantors of CH Steel Sdn Bhd. Even assuming that they do have a caveatable interest, they would not be able to show serious issues to be tried. The dissatisfaction over the liquidator's decision to sell the land at a price that was RM1m lower than the price that was offered by the willing purchaser was not a serious question to be tried. Further, the allegation of failure to act in good faith was tantamount to an allegation of fraud which allegation must be expressly

pleaded and sufficiently particularized. There was no instance of fraud or improper conduct of both the applicants in carrying out the sale. The nominated purchaser proposed by the company to the bank did not tender for the property when the receiver advertised it for sale or when the liquidator again re-advertised it for sale. In such circumstances, where all the proper steps were taken, even a registered proprietor of the land was not entitled to lodge a private caveat or complaint that the sale was at such an undervalue
(see para 12).

(2) The sale was properly conducted after a tender exercise was carried out. The purchase price was in accordance with the forced sale value at that time. It was not correct for the respondents to say that the sale was at an undervalued price since the valuation report that they relied on was prepared way back in 1997. As such, the respondents had failed to show that the sale was at such an undervalue such as to indicate fraud so as to justify the sale being set aside (see para 13).

[Bahasa Malaysia summary

CH Steel Sdn Bhd telah digulungkan pada 22 Oktober 2003. Sebelum penggulungan, CH Steel Sdn Bhd adalah pemilik berdaftar beberapa bidang tanah ('tanah tersebut'). Sebagai cagaran kepada pinjamannya, CH Steel Sdn Bhd telah mendepositkan surat ikatan hak milik tanah tersebut kepada Bank HSBC (M) Sdn Bhd ('bank tersebut'). Selepas CH Steel Sdn Bhd gagal membuat bayaran pinjaman, bank telah melantik penerima dan pengurus aset-aset yang dicagarkan kepada bank tersebut dan juga memulakan prosiding undang-undang terhadap CH Steel Sdn Bhd dan penjamin-penjamin di Mahkamah Tinggi Pulau Pinang. Satu penghakiman persetujuan telah dimasuki terhadap CH Steel Sdn Bhd dan penjamin-penjamin. Menurut penghakiman itu langkah-langkah telah diambil oleh penerima dan pengurus untuk menjual tanah tersebut. Mereka tidak berjaya. Selepas CH Steel Sdn Bhd digulungkan pada 22 Oktober 2003 oleh pemiutang Bitart Hardware Sdn Bhd ('pemohon'), bank tersebut telah menemui penyelesai untuk menjual tanah tersebut. Penyelesai dengan persetujuan bank tersebut telah menetapkan jumlah penebusan sebanyak RM9.5j dan menjual tanah tersebut kepada Tatt Giap Steel Centre Sdn Bhd melalui satu perjanjian jual beli bertarikh 31 Disember 2004.

Responden-responden, yang merupakan pemegang-pemegang saham CH Steel Sdn Bhd, telah memasukkan satu kaveat ke atas tanah tersebut. Justeru itu, pemohon, penyelesai CH Steel Sdn Bhd dan bank tersebut telah memfailkan permohonan ini untuk mengalihkan kaveat persendirian atas alasan bahawa responden-responden tiada kepentingan yang boleh dikaveatkan atau benefisial dalam aset-aset CH Steel Sdn Bhd. Aduan utama responden-responden adalah bahawa penyelesai mengambil arahan daripada bank tersebut, pemiutang tidak dicagar dan menjual tanah tersebut di bawah nilai pasaran dan pada harga RM1j lebih rendah daripada apa yang pembeli dicalonkan oleh mereka telah menawarkan.

Diputuskan, membenarkan permohonan tersebut:

(1) Responden-responden tidak boleh mengekalkan bahawa mereka berhak untuk

memasukkan kaveat ke atas tanah tersebut kerana mereka adalah pemegang saham, penyumbang atau penjamin CH Steel Sdn Bhd. Jikapun dengan mengandaikan bahawa mereka mempunyai kepentingan yang boleh dikaveatkan, mereka tidak dapat menunjukkan persoalan serius yang perlu dibicarakan. Berasa tidak puas hati dengan keputusan penyelesai untuk menjual tanah tersebut pada harga RM1j lebih rendah daripada harga yang telah ditawarkan oleh pembeli yang berkeinginan bukan satu persoalan serius yang perlu dibicarakan. Bahkan, pengataan tentang kegagalan untuk bertindak dengan niat baik sama seperti satu pengataan fraud yang mana pengataan hendaklah diplidkan dengan jelas dan dibutirkan dengan terperinci. Tiada perbuatan fraud atau tidak betul oleh kedua-dua pemohon dalam menjalankan jualan itu. Calon pembeli yang dicadangkan oleh syarikat kepada bank tersebut tidak menenderkan hartanah tersebut apabila penerima mengiklankannya untuk jualan atau apabila penyelesai sekali lagi mengiklankannya untuk jualan. Dalam keadaan sedemikian, di mana semua langkah-langkah yang perlu telah diambil, malah tuanpunya berdaftar tanah tersebut tidak berhak untuk memasukkan kaveat persendirian atau aduan bahawa jualan itu di bawah nilai pasaran (lihat perenggan 12).

(2) Jualan tersebut telah dijalankan dengan lancar selepas amalan tender dikendalikan. Harga belian adalah menurut nilai desakan jualan pada masa itu. Adalah tidak betul untuk responden-responden menyatakan bahawa jualan tersebut di bawah harga pasaran kerana laporan penilaian yang mereka bergantung kepada disediakan pada 1997. Oleh itu, responden-responden telah gagal untuk menunjukkan bahawa jualan tersebut pada nilai yang kurang untuk membuktikan fraud agar dapat menjustifikasikan jualan itu diketepikan (lihat perenggan 13).]

Notes

For cases on private caveats, see 8(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3502–3503.

Cases referred to

Asia Commercial Finance (M) Bhd & Anor v Development & Realtor Sdn Bhd [1992] 2 MLJ 504 (refd)

Malayan Prestressed Concrete Stand Manufacturing Sdn Bhd (dalam penerimaan) dan satu yang lain lwn Malaysian Ropes Sdn Bhd [1991] 3 MLJ 482 (refd)

Murugappa Chettiar Lakshmanan v Lee Teck Mook [1995] 1 MLJ 782 (refd)

Noble Success Sdn Bhd v Kiyotake Hara & Anor [1997] MLJU 300 (refd)

Public Bank Bhd v Ng Chee Ping & Anor [1998] 4 MLJ 449 (refd)

Legislation referred to

National Land Code 1965 s 323(1), (2), Form 19B

SS Soo (Paul Ong & Associates) for the petitioner.
Vinayaga Raj Ratnam (Skrine & Co) for applicants.
KT Rajah Naidu (KT Rajah Naidu & Partners) for the respondent.

Abdul Wahab Said Ahmad J:

[1] CH Steel Sdn Bhd was wound up on 22 October 2003. The applicants, CH Steel Sdn Bhd's liquidator and HSBC Bank Malaysia Berhad ('the bank') filed an application in Enclosure 57 for an order that the Private Caveat Presentation No 1078/2005 and any other private caveats presently unknown to the applicants which have been entered by the Respondents in respect of the lands held under HSD 14941 Lot No PT 2961 and HSD 14940 Lot No PT 2960 Mukim 11 Daerah Seberang Perai Tengah, Negeri Pulau Pinang ('the said land') be forthwith removed and cancelled. The applicants also prayed for a declaration that the respondents ('Lim Ah Choo and eight others') have no caveatable interest in the said land and an injunction restraining the respondents from lodging any further private caveats on the said land.

[2] CH Steel Sdn Bhd is the registered owner of the said land. As security for its loan, CH Steel Sdn Bhd had deposited the documents of title to the lands with the bank and the bank had duly lodged a lienholder's caveat on the lands. After CH Steel Sdn Bhd defaulted in payment of the loan, the bank appointed receivers and managers of the assets charged to the bank pursuant to a debenture executed by CH Steel Sdn Bhd and also commenced legal proceedings against CH Steel and the guarantors in the Penang High Court. A consent judgment was entered against CH Steel Sdn Bhd and the guarantors in the said proceedings for the amount of RM17,149,513.96. Pursuant to the said judgment, steps were taken by the receivers and managers to dispose off the said lands. They were not successful. After CH Steel was wound up on 22 October 2003 at the instance of a creditor Bitart Hardware Sdn Bhd, the bank approached the liquidator to sell the lands. The liquidator with the consent of the bank fixed the redemption sum at RM9.5m and sold the lands to Tatt Giap Steel Centre Sdn Bhd vide a sale and purchase agreement dated 31 December 2004.

[3] Soon Cheng Kee, a shareholder of CH Steel Bhd, lodged a caveat on the lands. Hence, the applicants' application to remove it on the ground, inter alia, that Soon Cheng Kee has no caveatable or beneficial interest in the assets of CH Steel. Soon Cheng Kee had relied on a 'without prejudice' letter dated 1 April 2003 from the bank's solicitors to the solicitors for CH Steel and its directors or shareholders that states the market value of the land was RM27m, as stated in a valuation report by Rahim & Co dated 1997. The letter was written in response to a 'without prejudice' proposal by CH Steel Sdn Bhd to permit the lands to be sold to a purchaser nominated by them for the sum of RM10.5m. By that letter, the applicants contend that Soon Cheng Kee is no longer maintaining that the lands ought to be sold for RM27mn.

[4] The liquidator said that the bank was committed to redemption of the lands on payment of the sum of RM9.5m. That purchase price was in line with the forced sale value of the lands at the relevant time. No one had bid for the lands pursuant to the tender exercise carried out firstly by the receivers and managers and subsequently by the liquidator.

[5] The applicants in their submissions said that the respondents must show that they have a caveatable interest and must produce sufficient evidence in support of their claim. If the above are fulfilled then it lies to be considered whether the balance of convenience is in their favour. The applicants said that the Respondents have not shown that they have a caveatable interest. They have also not shown what interest that they are claiming on the land.

[6] The applicants submitted that there is a separation between the property of the company and that of its shareholders. Citing the case of *Noble Success Sdn Bhd v Kiyotake Hara & Anor* [1997] MLJU 300, the applicants said that a managing director, shareholder do not have a right to caveat property of the company. Even a registered proprietor of a land is not entitled to enter private caveat in respect of his own land (see *Asia Commercial Finance (M) Bhd & Anor v Development & Realtor Sdn Bhd* [1992] 2 MLJ 504).

[7] The applicants citing *Malayan Prestressed Concrete Stand Manufacturing Sdn Bhd (dalam penerimaan) dan satu yang lain lwn Malaysian Ropes Sdn Bhd* [1991] 3 MLJ 482 said that before the court could recognize respondents being guarantors, as having an interest to lodge a caveat, a sufficient sum of money should have been deposited by the respondents in court, or the total sum claimed should have been paid. To cap up their submissions, the Applicants said that even a receiver owes no duty of care to the guarantors, (see *Public Bank Bhd v Ng Chee Ping & Anor* [1998] 4 MLJ 449).

[8] The respondents main complaint is that the Liquidator is taking instructions from the Bank, an unsecured creditor and is selling the land below market value and at a price RM1m lower than what a purchaser nominated by them had offered.

[9] In determining the issue whether the Respondents have a caveatable interest I drew upon the authorities cited by the applicants. In *Noble Success Sdn Bhd* the case of *Murugappa Chettiar Lakshmanan v Lee Teck Mook* [1995] 1 MLJ 782, CA was referred to, where the Court of Appeal set down clearly the steps in considering whether a caveat should be sustained. The Court of Appeal said that in order to sustain a caveat, a caveator must first pass through three stages: (1) whether he has disclosed a caveatable interest in his application under s 323(1) of the National Land Code 1965; (ii) if he has established a caveatable interest, then whether the evidence produced in support of this claim discloses a serious question to be tried; and (iii) if both questions are resolved in the caveator's favour, then whether the balance of convenience or justice, lies in favour of the caveat remaining on the register pending the disposal of his suit. In considering whether a caveatable interest has been disclosed, that consideration is confined to the reasons set out in Form 19B required by s 323(2).

[10] I am in agreement with *Noble Success Sdn Bhd* that:

> there is a clear separation between the property of the company and that of its shareholders. Thus a managing director, shareholder or officer of a company did not have the right to caveat the property of the company merely by virtue of their position in the company. By the same token, a person expecting to be a shareholder or even a director of a company

did not ipso facto have a caveatable interest in the landed property of the company. In addition, it was wholly beyond the powers of the shareholders to subject the property of the applicant to a caveat The caveat in the first place could not be sustained irrespective whether the respondents have 100% or 45% of the shareholding.

[11] *Nobel Success Sdn Bhd* also cited the case of *Hew Sock Ying v Hew Tin Hee* [1992] 2 MLJ 189, SC where the Supreme Court held that:

> It is a well-established principle of law that a limited company incorporated under the Companies Act 1965 and the individuals forming the company are distinct legal entities however completely the role might be by one or more individuals of this Company … In this appeal, we must not lose sight of the fact that the company is the registered proprietor of the land …. In such circumstances, it is impossible to envisage how the managing director either personally or as a shareholder or as an officer of the company can be said to have a caveatable claim or registrable interest under s 323(1) …

[12] It is clear from the above authority that the respondents could not maintain that they are entitled to lodge a caveat on the lands merely because they are shareholders, contributories or guarantors of CH Steel Sdn Bhd. Even assuming that they do have a caveatable interest, they would not be able to show serious issues to be tried. I do not think dissatisfaction over the liquidator's decision to sell the land at a price that is RM1m lower than the price that is offered by the willing purchaser is a serious question to be tried. The offer by the nominated purchaser for RM10.5m is in full and final settlement and satisfaction of their indebtedness however included that the directors as guarantors also be absolved from their liability. The allegation of failure to act in good faith is tantamount to an allegation of fraud which allegation must be expressly pleaded and sufficiently particularized. I do not find any instance of fraud or improper conduct of both the applicants in carrying out the sale. The nominated purchaser proposed by the company to the bank did not tender for the said property when the receiver advertised it for sale or when the liquidator again re advertised It for sale. There were no bidders except for the machinery. In such circumstances, where all the proper steps are taken, even a registered proprietor of the land is not entitled to lodge a private caveat or complaint that the sale is at such an undervalue. In *Asia Commercial Finance (M) Bhd & Anor v Development & Realtor Sdn Bhd* [1992] 2 MLJ 504, it was held that:

> (5) A chargee in exercising the power to sell under the Code owes a duty to a charger to take reasonable care to obtain the true market value of the land at the date of the sale. Such a duty flows from equity's recognition that a charger has an interest in the surplus, if any, arising from the sale. A sale at an undervalue is not automatically set aside but the undervalue may be so gross as to indicate fraud or want of proper care, (6) In this case the valuation reports in respect of the land did not express any opinion on the basis of a statutory sale by public auction. Ooi's bid was one of 11 whereby free market forces were at work. The sale was pursuant to a charge order made in a charge action and was not a private sale. Accordingly the court was not prepared to hold that the sale in this case was at such an undervalue as to indicate fraud or want of proper standards of care so as to justify the ale being set aside. (7) The chargor's remedy, if any, should be confined to a claim in damages against the chargee.

[13] Similarly, in this case, the sale was properly conducted after a tender exercise was carried out. The purchase price is in accordance with the forced sale value at that time. It is not correct for the respondents to say that the sale is at an undervalued price since the valuation report that they relied on was prepared way back in 1997. As such, the respondents had failed to show that the sale was at such an undervalue such as to indicate fraud so as to justify the sale being set aside. It follows that the respondents had also failed to show that there are serious questions to be tried to justify the lodging of the caveat.

[14] On the above premises, I allowed the applicant's application to remove the caveat, the declaration that the respondents have no caveatable interest and an injunction against the lodging of any further caveats by the respondents with costs.

Application allowed.

Reported by Loo Lai Mee